former, attack is made upon the rates which are filed as being unreasonable, and this ordinarily calls for the exercise of the Commission's special and technical knowledge. In the latter, no attack is made upon the reasonableness of the rate in the tariff on file but it is simply asserted that the carrier charged more than the rate on file.

An examination of these special docket applications shows that the Chicago, Rock Island & Pacific Railway Company, in the first-mentioned application, sought authority to pay the Burrus Mill & Elevator Company $733.92 as *reparation for the exaction of unreasonable transit* charges on certain of the shipments involved here. In the second special docket application the same Railway Company sought authority to pay to the Burrus Mill & Elevator Company $23,669.07 as *reparation for the exaction of unreasonable transit charges* on the remainder of the shipments involved here. It will be seen, therefore, that the special docket applications filed by the Railway Company deal with reparation for the exaction of unreasonable transit charges, whereas this is purely a suit to recover overcharges—charges in excess of the filed rate and involves merely a matter of tariff construction and does not in any sense involve the question of the reasonableness of any rate, rule, or regulation.

It is recited in the special docket applications (R. p. 196 and R. p. 232) that the net result of the assessment of 34 cents instead of 11 cents for the rate factor from St. Louis to Memphis was equivalent to assessing a charge of 23 cents per hundred pounds for stopping shipments in transit at Kingfisher. The same applications (R. p. 196 and R. p. 223) state that it is admitted that the rates or rules legally applicable at the time and over the routes the shipments moved were, under the circumstances and conditions then existing, excessive and unreasonable. That question is not here before the Court.

The sole contention here is that the 11 cents rate factor was either applicable to the shipments in question, with

transit privileges at Enid and Kingfisher, or that the tariffs were ambiguous and should be construed against the maker thereof. It is conceded that the filing of these special docket applications would, under the Commission's rules, toll the statute of limitations as to the particular matters that are covered by them, i.e., violations of Section 1 of the Act, which requires that the carriers maintain reasonable rates, rules and regulations. However, they would not toll the statute of limitations as to violations of Section 6 of the Act, which requires the carriers to file tariffs which shall plainly state the rates, rules and regulations and strictly observe the terms of said tariffs.

It is clear from the foregoing that the letters from Mr. Simpson to the Secretary of the Commission did not measure up to a complaint for the recovery of damages, which would constitute an election, and the special docket applications filed by the Railway Company dealt with an entirely separate subject, namely, the reasonableness of the transit charge imposed of 23 cents per hundred pounds. These special docket applications filed by the Railway Company cannot constitute an election by the appellant as they were not filed by the appellant and because they deal with a different subject-matter. The letter from the Acting Secretary of the Commission to Mr. Simpson, dated September 4, 1935 (R. pp. 187-8), shows that many of the facts appearing of record here were not before the Commission's Section of Tariffs at the time the matter was being considered there. It is significant that this letter states (R. p. 188):

> "This opinion, of course, is informal only and is without prejudice to your right to file a formal complaint if you desire to attack the conclusions thereof."

There is nothing in the letter to indicate that the matter was considered by the Commission or a Division thereof, and it does not indicate that it is or purports to be a Report and Order of the Commission. It appears to be a letter prepared by the Section of Tariffs for the signature of the

Acting Secretary. Complaints before the Commission are decided by the Commission or a Division thereof and are disposed of by formal orders and written reports. At best, this letter can be construed as an opinion of one of the employees of the Commission based upon a very meager showing of facts. In no sense can it be construed as an official act of the Commission.

## III.

## THE EXCEPTION TO ITEM 20.

On page 15 of petitioners brief in support of the petition, it is shown that when certain of these shipments of wheat were moved out of Enid to Kingfisher for milling that there was no additional transportation charge accrued or assessed and the contention was made that if Item 20 meant that a shipment from St. Louis to Memphis, milled at Kingfisher or stored at Enid, made it necessary to have collected the Kansas City combination of 34 cents, then the same item certainly meant that on a shipment of wheat from St. Louis to Kingfisher, stored at Enid, the combination on Kansas City would also have to be applied. On page 27 of the brief of respondents an attempt is made to refute petitioner's contention in this matter but it is very significant that there is no reference whatever to any tariff item or any portion of the record. The record is made up of a stipulation of facts and various documents including the tariffs and nowhere is there any substantiation of any of the alleged facts appearing on page 27 of respondents' brief. That being true, all that appears thereon must be ignored.

## CONCLUSION.

In opening the argument in their brief the respondents on page 19 quote from *Southern Pacific Co.* v. *Lothrop,* 15 Fed. (2d) 486 the following quotation found on page 487:

> "Astute ingenuity might succeed in reading ambiguity into the language, but the ordinary, intelligent shipper would find none."

This quotation is set forth in bold face type by respondents, and it is a happy quotation indeed from the point of view of the petitioner because it shows that it is language completely inapplicable to the situation here. Not only did the shipper find the provisions ambiguous, but so did the respondents although it was their tariff which contained the ambiguity. In writing to the Secretary of the Interstate Commerce Commission respondents stated (R. p. 82):

> "* * * insofar as concerns Item 20 Rock Island Tariff 34562 we have not in our attempt to interpret the various tariff provisions felt that we could safely construe such Item 20 as being set aside by the other items in the tariff mentioned, namely 600 and 735-A".

This Court has said on innumerable occasions that where there is no ambiguity there is no necessity for construction, and we submit that this is correct, and plainly shows that the necessity for construction did arise here because of the very fact that the tariff was ambiguous.

The case was decided erroneously by the Circuit Court of Appeals; the petition should be granted and the judgments below reversed.

Respectfully submitted,

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